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International Covenant on Civil and Political Rights: A New Challenge to the Legality of the Juvenile Death Penalty in the United States?

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THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: A NEW CHALLENGE TO THE LEGALITY OF THE JUVENILE DEATH PENALTY IN THE UNITED STATES?

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The Eighth Amendment protects citizens of the United States from "cruel and unusual" punishments.[1] The scope of this protection, however, has been ambiguous[2] and ultimately dependent upon the Supreme Court's interpretations of the Amendment's language.[3] To those who argue that concrete universal standards are needed to protect human rights, interpretations of the Eighth Amendment have been unduly deferential to the judgments of legislatures.[4] To highlight the purported in-

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1. U.S. CONST. amend. VIII. In short, "[w]hile the state has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards." Trop v. Dulles, 356 U.S. 86, 100 (1957). The prohibitions on "cruel and unusual" punishments appear in Anglo-American jurisprudence as far back as the 1042 laws of Edward the Confessor. Recent Cases, 34 MINN. L. REV. 134, 135 (1950). In addition to appearing in the Magna Carta and English Declaration of Rights of 1688, the laws of many American colonies codified the prohibition before the Framers included it in the Constitution. *See id.*

2. *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted."); *see also, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) ("The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours.").

3. *See Thompson*, 487 U.S. at 821 (stating that the authors of the Eighth Amendment "delegated" the contours of the Eighth Amendment to "future generations of judges"); *see also* Weems v. United States, 217 U.S. 349, 368-69 (1910) (declaring that it is the duty of the Court to determine the scope of the Eighth Amendment because "[w]hat constitutes a cruel and unusual punishment [prohibited by the Eighth Amendment] has not been exactly decided").

4. *See* Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1327 (1993) ("The Court should not be so willing to defer to the preferences of legislatures in analyzing cases under the Eighth Amendment."); Elisabeth Gasparini, *Juvenile Capital Punishment: A Spectacle of a Child's Injustice*, 49 S.C. L. REV. 1073, 1084 (1998) (arguing that reliance upon state legislatures to determine the scope of the Eighth Amendment has lead to uncertain standards); *cf.* James H. Wyman, Comment, *The Vengeance is Whose?: The Death Penalty and Cultural Relavatism in International Law*, 6 J. TRANSNAT'L L. & POL'Y 543, 552-53 & n.77 (1997) (sug-

adequacies of the Amendment's protection, many have pointed to the legality of capital punishment for juvenile offenders in the United States.[5]

With the globalization of human rights law[6] and the arguable development of international opposition to the death penalty,[7] many death penalty opponents now argue that there are new opportunities available in the fight against capital punishment.[8] Although the Eighth Amendment

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gesting that the Supreme Court's interpretations of the Eighth Amendment have inappropriately reflected changes in public opinion).

5. *See, e.g.*, Sherri Jackson, Note, *Too Young to Die—Juveniles and the Death Penalty—A Better Alternative to Killing Our Children: Youth Empowerment*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391, 409 & n.122 (1996) (citing Stanford v. Kentucky, 492 U.S. 361, 388 n.4 (1989) (Brennan, J., dissenting), which provides a thorough list of the legal, political, religious, academic, and international groups that have expressed opposition to the constitutionality of the juvenile death penalty).

6. *See generally* Jerome J. Shestack, *Globalization of Human Rights Law*, 21 FORDHAM INT'L L.J. 558, 559 (1997) (revealing that prior to World War II, "the law of international human rights was essentially non-existent"). Since World War II, however, many significant human rights treaties have created tangible sources of international law. *See id.* at 559-60. These sources include the Universal Declaration of Human Rights, the International Treaty on Civil and Political Rights, the Genocide Convention, the International Treaty on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Political Rights of Women, the United Nations Convention Relating to the Status of Refugees, the Convention on the Rights of the Child of 1989, Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention against Torture), and the Conference on Security and Cooperation in Europe. *See id.* In addition to these treaties, "there has been a dramatic increase in the number of U.N. 'organs' devoted primarily to human rights matters, as well as a major increase in the time allocated by some of the existing organs to the human rights component of their mandates." Prakash Shah, *International Human Rights: A Perspective from India*, 21 FORDHAM INT'L L.J. 24, 25 (1997).

7. *See* Amnesty International, *Facts and Figures on the Death Penalty* (last modified Aug. 26, 1999) <http://www.amnesty.org/alib/intcam/dp/dpfacts.htm> (explaining that since 1976 "[m]ore than *two* countries a year on average have abolished the death penalty"). Amnesty International asserts that 105 nations have taken a stand against the death penalty in either law or practice, while only 90 nations retain the death penalty. *See id.* As of 1990, only six nations have permitted the execution of minors: Iran, Nigeria, Pakistan, Saudi Arabia, the United States, and Yemen. *See id.*

8. *See, e.g.*, William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 323 (1995) [hereinafter Schabas, *Invalid Reservations*] (arguing that the United States's juvenile death practices violate its commitments under the International Covenant on Civil and Political Rights); William Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 814 (1998) [hereinafter Schabas, *International Law*] (arguing that there is strong evidence indicating that international customary norms should prohibit the use of the death penalty in the United States); Lisa Kline Arnett, Comment, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245, 255 (1988) (suggesting that international disfavor of the juvenile death penalty should be incorporated into the federal common law); *see also, e.g.*, WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 1 (1993) [hereinafter SCHABAS, ABOLITION OF THE DEATH

has traditionally been unsympathetic to the abolitionist cause,[9] a growing body of case law suggests that a more developed body of international law may now offer protections beyond those of the Amendment.[10] The recently decided *Domingues v. Nevada*[11] was the first case to present this argument to an American court.[12]

Domingues involved a 1996 death sentence given to Michael Domingues for crimes he committed at the age of sixteen.[13] Domingues appealed his sentence for an array of reasons, all of which the Nevada Supreme Court unanimously rejected.[14] Domingues followed this appeal,

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PENALTY]. Schabas notes that international arguments against the death penalty could not exist fifty years ago because the "subject matter did not exist." *Id.* at 1. Schabas goes on to argue that evolving norms in international law show "an inexorable progress towards abolition." *Id.* at 18; *see generally* Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735 (1998) (arguing that the United States is bound by international treaty law to abstain from executing minors).

9. At one time, however, it appeared as if the Eighth Amendment would be used to prohibit capital punishment in the United States. *See* Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1 (noting that each Justice handed down his own opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), and concluding that the death penalty may become completely unconstitutional under the Eighth Amendment).

10. *See* Pressley v. Alabama, No. 1981061, 2000 WL 356347, at *7-*9 (Ala. Apr. 7, 2000) (Houston, J., concurring) (drawing attention to the possibility that the ICCPR might prohibit Alabama from executing minors); Burgess v. Alabama, No. 1980810, 2000 WL 92254, at *7-*9 (Ala. Jan. 28, 2000) (Houston, J., concurring) (submitting that "I am not persuaded that the Senate's resolution removes the ICCPR [juvenile death penalty] prohibition in State courts"); Domingues v. Nevada, 961 P.2d 1279, 1281 (Nev. 1998) (Rose, J., dissenting) (positing that the International Covenant on Civil and Political Rights may forbid Nevada from executing minors), *cert. denied*, 120 S. Ct. 396 (1999).

11. 961 P.2d 1279 (Nev. 1998) (holding that Nevada's juvenile death penalty is not unconstitutional despite the United States's ratification of the International Covenant on Civil and Political Rights), *cert. denied*, 120 S. Ct. 396 (1999).

12. *See* Brief for the United States as Amicus Curiae at 12, Domingues v. Nevada, 102 S. Ct. 396 (1999) (No. 98-8327) (pointing out that American courts have had no occasion to determine whether customary international law may preempt a state's criminal punishment "that is not otherwise subject to attack as conflicting with the responsibilities of the National Government or a source of federal law").

13. *Domingues*, 961 P.2d at 1280; Domingues v. Nevada, 917 P.2d 1364, 1369 (Nev. 1996). On October 22, 1993, Domingues broke into the house of Arjin Chanel Pechpo. *See id.* at 1369. When Pechpo and her four-year-old son entered the house, Domingues strangled Pechpo with a cord. *See id.* Domingues then dragged Pechpo's body into her tub, filled it with water, and ordered Pechpo's four-year-old son to get in the tub with his dead mother. *See id.* When the son complied, Domingues attempted to electrocute the boy by throwing a hair dryer into the tub; however, when this failed, Domingues stabbed the four-year-old to death. *See id.* Domingues's accomplice and friend later explained that Domingues committed the crime because Pechpo had yelled at Domingues's girlfriend days earlier. *See id.*

14. *See generally Domingues*, 917 P.2d at 1370-78. Domingues argued that the death sentence handed down by the district court was invalid due to trial errors concerning cer-

however, with a separate appeal for the correction of an illegal sentence.[15] Under this second appeal, Domingues argued that the United States is forbidden to permit the execution of minors due to its ratification of the International Covenant on Civil and Political Rights (ICCPR or Covenant) in 1992.[16] Domingues further argued that U.S. death penalty laws violate *jus cogens*[17] and customary international law.[18] In a 3-2 split, the Nevada Supreme Court affirmed the lower court's dismissal of Domingues's appeal.[19]

Unlike prior death penalty arguments that have drawn attention to in-

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tain testimony, the admission of certain evidence, the content of jury instructions, and the harshness of the sentence. *See id.* The Nevada Supreme Court rejected these arguments and held that Domingues was "fairly tried, convicted and sentenced." *Id.* at 1378.

15. *See Domingues*, 961 P.2d at 1279.

16. *See id.* Article 6 of the ICCPR declares that the "[s]entence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women." International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, para. 5, 999 U.N.T.S. 171, 175 [hereinafter ICCPR].

17. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986) (defining *jus cogens* as a rule of international law that is "recognized by community of states as preemptory" and "permitting no derogation"); *see also* de la Vega & Brown, *supra* note 8, at 759-62 (suggesting that the prohibition on the execution of minors has achieved *jus cogens* status, and thus binds the United States).

18. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986) (defining international customary law as law that results from the "general and consistent practice of states followed by them from a sense of legal obligation"); *see also* Arnett, *supra* note 8, at 257-60 (1988) (arguing that international customary law should supersede state law).

19. *See Domingues*, 961 P.2d at 1279, 1280. The *Domingues* court concluded that the Senate's express reservation to the ICCPR's death penalty provision was sufficient to uphold the legitimacy of Nevada's death penalty laws. *Id.* at 1280. Speaking for the court, Justice Young noted that other state laws permitting the execution of juvenile offenders have continually withstood constitutional scrutiny. *See id.* at 1279, 1280. Accordingly, Justice Young concluded that Domingues's death sentence does not violate any U.S. treaty commitments. *See id.* Chief Justice Springer, however, dissented and pointed out the seeming absurdity of the United States being a party to a treaty while "rejecting one of its most vital terms." *Id.* at 1280 (Springer, C.J., dissenting). Based on this apparent conflict, and the idea that condoning the death penalty for juvenile offenders puts the United States in the company of "Iran, Iraq, Bangladesh, Nigeria, and Pakistan," Chief Justice Springer withheld his approval of the majority opinion. *Id.* at 1281 (Springer, C.J., dissenting). Justice Rose, in a separate dissent, drew attention to the unsettled nature of the questions posed to the court. *See id.* at 1281 (Rose, J., dissenting). Justice Rose argued that the "penultimate issue" in need of resolution was the question of "whether the Senate's reservation was valid." *Id.* (Rose, J., dissenting). After drawing attention to sources that seemed to indicate that the United States may have made invalid reservations, Justice Rose asserted that if these sources are accurate, the next question should be whether the United States is still a party to the treaty. *See id.* (Rose, J., dissenting). Justice Rose concluded that the fact-specific details relevant to this question should be resolved on remand to the district court where a "full hearing on the effect of the ICCPR" could be held. *Id.* (Rose, J., dissenting).

ternational law,[20] Domingues's appeal argued that international law is more than a mere interpretive tool for the Eighth Amendment.[21] In effect, Domingues argued that the ICCPR offers protections beyond those contained in the Constitution.[22] Although the United States ratified the ICCPR expressing its intent not to be bound by provisions at odds with its own death penalty practices,[23] Domingues argued that international law has shown these reservations to be invalid.[24] As a result, Domingues argued that the United States is bound without exception to all ICCPR provisions.[25] Perhaps the most interesting aspect of the case is the attention that it draws to the unsettled gray area surrounding the United States's death penalty laws and its international treaty commitments.[26]

This Comment explores the questions of international treaty law that *Domingues* raises; it does not express a view on whether U.S. juvenile death penalty practices are sound public policy. Rather, this Comment examines whether international treaty law mandates a change in the status of the death penalty in the United States. This Comment first ex-

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20. *See* discussion *infra* Part I.A-B (discussing Supreme Court cases dealing with this issue); *see generally* Ann I. Park, Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987) (describing how international standards have been used to define the scope of certain protections in the U.S. Constitution).

21. *See Domingues*, 961 P.2d at 1279, *petition for cert. filed*, 68 U.S.L.W. 3289 (U.S. Nov. 1, 1999) (No. 98-8327) (maintaining that international law forbids Nevada from executing juvenile offenders).

22. *See* Brief for the United States as Amicus Curiae at 7, Domingues v. Nevada, 102 S. Ct. 398 (1999) (No. 98-8327). Domingues argued that:

> [E]ven if the Senate's reservation to Article 6(5) is valid as a matter of United States constitutional law, it is not valid as a matter of the international law of treaties, and so the United States must be deemed to have accepted all of Article 6(5) without reservation, including the prohibition against capital punishment for offenders under 18 years of age.

Id.

23. *See* United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, Jan. 30, 1992, 31 I.L.M. 645, 646 [hereinafter Senate Comm. on Foreign Relations]. The U.S. reservation to Article 6 states that it: "reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such crimes committed by persons below 18 years of age." *Id.*

24. *See* Petition for Writ of Certiorari to the Nevada Supreme Court at 26, *Domingues* (No. 98-8327) (1999) (stating that the U.S. death penalty reservations are invalid because they violate the "object and purpose" of the International Covenant on Civil and Political Rights).

25. *See id.*

26. *See Domingues*, 961 P.2d at 1281 (Rose, J., dissenting) (opining that the issues raised in *Domingues* highlight many unsettled and complicated international matters that might potentially affect the legality of the juvenile death penalty in the United States).

amines how international laws and standards have been used in previous Supreme Court rulings on the death penalty. This Comment then seeks to determine under what frameworks, and by whose authority, the validity of U.S. reservations to the ICCPR should be examined. This Comment concludes that there is insufficient authority to rule that the United States's reservations are invalid. This Comment also notes that even if the United States made an invalid reservation, it did not consent to the entire ICCPR; accordingly, American courts should not bind the country to provisions to which it has explicitly withheld consent.

I. INTERNATIONAL LAW AND ITS USE IN EIGHTH AMENDMENT INTERPRETATION

Despite the considerable amount of public discourse now surrounding the death penalty, the Supreme Court did not refer to the Eighth Amendment until 1867.[27] Since that time, the role of international law has had varying influence on the Court's interpretation of the Amendment.[28]

A. Trop v. Dulles—*Opening the Constitutional Gateway to International Ideas on the Meaning of "Cruel and Unusual"*

In *Trop v. Dulles*,[29] the Supreme Court addressed an American's claim that he was unconstitutionally denied admittance into the United States because he had deserted his U.S. Army company during wartime.[30] Considering whether the Eighth Amendment prohibited this expulsion, the Court referred to "evolving standards of decency."[31] The Court gauged these standards by pointing out that expelling the petitioner for his de-

27. *See* WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE 21 (1996) (revealing that the first case to address the Eighth Amendment was *Pervear v. Commonwealth*, 5 Wall. 475, 479-80 (1866)). In part, *Pervear* discussed whether the Eighth Amendment applied to state governments. *Pervear*, 5 Wall. at 476. The Court ruled that the Eighth Amendment applies only to federal actions, but that even if the Amendment were to apply to state actions, it would not bar a state from fining and sentencing a person to three months of hard labor for violating a state statute forbidding the "keeping and sale of intoxicating liquors." *Id.*

28. *Compare* Stanford v. Kentucky, 492 U.S. 361, 369 & n.1 (1989) (declaring that international standards are irrelevant to the constitutionality of the juvenile death penalty under the Eighth Amendment), *with* Thompson v. Oklahoma, 487 U.S. 815, 830 & n.31 (1988) (considering international death penalty standards as evidence against the constitutionality of the juvenile death penalty under the Eighth Amendment).

29. 356 U.S. 86 (1958) (ruling that under the Eighth Amendment, the U.S. government cannot expel a citizen for deserting his military company in wartime).

30. *See id.* at 87.

31. *Id.* at 101.

sertion would result in "a condition deplored in the international community of democracies."[32] The Court further noted that a "United Nations' survey of the nationality laws of eighty-four nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion."[33] Based in part on these international factors, the Court ruled that expulsion for military desertion contravened modern standards of decency, and thus violated Eighth Amendment protections.[34]

Indicative of the Court's acceptance of international law as an interpretive tool for the Eighth Amendment, the dissent in *Trop* did not object to the majority's reliance on international standards.[35] In fact, the dissent argued that had the majority considered all relevant international law, a more limited idea of Eighth Amendment protections would have emerged.[36]

The Court again employed international standards to broaden the protections of the Eighth Amendment in *Coker v. Georgia*.[37] In *Coker*, the Court observed that "in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of [Georgia's] criminal justice system."[38] Defending its use of international standards, the Court asserted that "the climate of international opinion concerning the acceptability of a particular punishment" is particularly relevant to decisions about the scope of the Eighth Amendment.[39] The Court eventually rejected the relevancy of international law, however, when it considered the constitutionality of executing persons for crimes committed as minors.[40]

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32. *Id.* at 102.

33. *Id.* at 103.

34. *See id.*

35. *Id.* at 114, 125-28 (Frankfurter, J., dissenting).

36. *See id.* at 126 (Frankfurter, J., dissenting) (asserting that "[m]any civilized nations impose loss of citizenship for indulgence in designated prohibited activities").

37. 433 U.S. 584, 592 & n.4, 593, 596 (1977).

38. *Id.* at 592 n.4.

39. *Id.* at 596 n.10. At the time of the decision, only three of sixty surveyed nations retained the death penalty for rapists. *See id.*

40. *See* Stanford v. Kentucky, 492 U.S. 361, 369 & n.1, 380 (1989) (ruling that the Constitution does not prohibit the execution of 16 or 17 year-old juvenile offenders and declaring that the "sentencing practices of other countries" are irrelevant factors to a proper constitutional analysis).

B. Thompson *and* Stanford*: The Rise and Demise of International Standards in Eighth Amendment Analysis*

In *Thompson v. Oklahoma*,[41] the Supreme Court held that the execution of criminals for crimes they committed at age fifteen violates the Eighth Amendment.[42] The Court noted that its holding "is consistent with the views that have been expressed by . . . other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[43] In her concurring opinion, Justice O'Connor also reasoned that because the "United States has agreed by treaty to set a minimum age of [eighteen] for capital punishment in certain circumstances," it is evident that evolving standards of decency oppose the application of the death penalty to minors.[44]

The dissent in *Thompson* particularly criticized the majority's use of international law.[45] Led by Justice Scalia, the dissent maintained that the "views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."[46] This sentiment soon resurfaced in *Stanford v. Kentucky*,[47] though this time in the majority opinion.[48]

In *Stanford*, the Supreme Court ruled that the Eighth Amendment's prohibition against "cruel and unusual punishment" does not bar the execution of offenders who were sixteen when they committed their crimes.[49] The majority narrowed the *Trop* modern standards of decency test to focus solely on evolving standards of decency in American soci-

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41. 487 U.S. 815 (1988).

42. *See id.* at 838.

43. *Id.* at 830.

44. *Id.* at 851 (O'Connor, J., concurring) (referring to Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which restricts the use of the death penalty on minors who are captured in war).

45. *See id.* at 864-68 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice White joined Justice Scalia's dissent. *See id.* at 859.

46. *Id.* at 868 n.4 (Scalia, J., dissenting).

47. 492 U.S. 361 (1989).

48. *See generally id.*

49. *Id.* at 380. The Court recognized two potential grounds for determining whether a penalty violates the Eighth Amendment. *See id.* at 368-69. In addition to considering the "'evolving standards of decency,'" the Court also considered whether the execution of minors would have been "'considered cruel and unusual at the time that the Bill of Rights was adopted.'" *Id.* at 368-69 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) and Ford v. Wainwright, 477 U.S. 399, 405 (1986)). Although the petitioners in *Stanford* did not appeal on this ground, the Court signaled that had such an appeal been made, it would have been irrelevant due to the overwhelming consensus that the execution of juvenile offenders at the time of the Bill of Rights was not considered cruel or unusual. *Id.* at 368.

ety.[50] When deciphering these American standards, the majority argued that only objective evidence should be considered.[51] Upon the assumption that patterns of state and federal laws were the "primary and most reliable" sources of objective evidence, the majority ruled that the execution of juvenile offenders complied with evolving American standards of justice.[52]

The dissent in *Stanford* criticized the majority for not using the "more searching inquiry . . . mandated by [its] precedents interpreting the Cruel and Unusual Punishments Clause."[53] Furthering this sentiment, the dissent faulted the majority for not considering the legislation and treaties of other countries to gauge evolving standards of decency.[54] The dissent, however, stopped short of suggesting that any international law or treaty superseded a state's right to execute juvenile offenders.[55] Instead, the dissent argued that the world community's disapproval of the death penalty is one of the many reasons to conclude that capital punishment for youth offenders is unconstitutional.[56]

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50. *See id.* at 369 & n.1. The Court emphasized that "it is *American* conceptions of decency that are dispositive" in determining the scope of Eighth Amendment protections. *Id.* at 369 & n.1.

51. *See id.* at 369. In ascertaining what constituted objective evidence, Justice Scalia dismissed the relevancy of "public opinion polls, the views of interest groups, and the positions adopted by various professional associations" as "uncertain foundations." *Id.* at 377.

52. *Id.* at 373. When deciding whether norms expressed by state legislatures are pervasive enough to qualify as evolving American standards of decency, Justice Scalia looked to previous case law. *See id.* at 369-72. Relevant case law cited by Justice Scalia included: *Enmund v Florida*, 458 U.S. 782, 792 (1982), which struck down capital punishment for accomplices to robberies where murder occurs because at the time only eight other jurisdictions would have permitted such a penalty; *Ford v. Wainwright*, 477 U.S. 399, 408 (1986), which held that a state's execution of an insane person required an adequate hearing on the issue of insanity because no other state allowed such an execution without a hearing; and *Solem v. Helm*, 463 U.S. 277, 300 (1983), which overruled a state's life sentence without parole statute because it was more severe than the statutes of any other state. *See id.* at 371. At the time of *Stanford*, the majority of states with the death penalty permitted the execution of juvenile offenders. *See id.*

53. *Id.* at 383 (Brennan, J., dissenting). In addition, Justice Brennan criticized the majority for only considering a "narrow range of factors as determinative of . . . whether a punishment violates the Constitution because it is excessive." *Id.* at 391. Justice Blackmun, Justice Marshall, and Justice Stevens all joined Justice Brennan's dissent. *See id.* at 382.

54. *See id.* at 389 (Brennan, J., dissenting) (citing *Trop* as one case that used international standards to determine the scope of the Eighth Amendment).

55. *See id.* at 389-90 (Brennan, J., dissenting).

56. *See id.* at 390 (Brennan, J., dissenting). The dissent also considered the fact that the majority of U.S. states and "respected organizations" reject the death penalty for minors. *Id.* (Brennan, J., dissenting).

II. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR): GROUNDS FOR A POSITIVIST ARGUMENT AGAINST THE DEATH PENALTY FOR MINORS?

To some, *Stanford* captures the way in which positivism has affected the interpretation and formation of American law.[57] Others have also pointed out that positivism has changed the way that international law is formed.[58] Instead of developing international law through unwritten customs, common law, and reference to natural laws, states have constructed concrete treaties and agreements to bind fellow nations.[59] Unlike arguments that appeal to uncodified international standards, treaties such as the ICCPR potentially allow for positivist arguments against the legality of the United States's juvenile death penalty laws.[60]

A. The Formation of the ICCPR

The ICCPR is one of three documents intended to comprise the International Bill of Human Rights (IBHR).[61] An American-led United Na-

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57. *See, e.g.*, Licia A. Esposito, *The Constitutionality of Executing Juvenile and Menatally Retarded Offenders: A Precedential Analysis and Proposal for Reconsideration*, 31 B.C. L. REV. 901, 961 (criticizing the Supreme Court's positivist approach in *Stanford* and other Eighth Amendment cases); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1357 n.127 (1990) (describing *Stanford* as a decision that exemplifies the positivism of Justice Scalia and other members of the current Supreme Court).

58. *See, e.g.*, Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 148 (1996). Loschin states that:

> The trend toward positivist preferences for the formation of international law has changed the way international law is formed. Instead of developing custom through practice over decades or centuries, modern international bodies develop and adopt multilateral conventions on topics of international concern. This is particularly true in the realm of human rights.

Id. at 148.

59. *See id.*; *see also* Shestack, *supra* note 6, at 559-60 (providing a list of recent treaties and international agreements evidencing a new focus in the human rights movement).

60. *See* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 435-36 (1997) (arguing that treaty law directly binds the United States to comply with many international human rights standards—including the ban on the juvenile death penalty); *see also* Schabas, *Invalid Reservations*, *supra* note 8, at 324 (suggesting that recent judgments by the European Court indicate that the United States may be bound by the entire ICCPR—including the Covenant's prohibition on the juvenile death penalty—despite the United States's reservations).

61. *See, e.g.*, Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1211 (1993). The International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights are the two other documents that comprised the IBHR. *See id.* at 1211.

tions put forth the idea of the IBHR as a means to impart human rights standards in former Axis countries.[62] As originally planned, the IBHR sought to espouse ideas around the world similar to those found in the American Bill of Rights.[63] Despite the United States's influence, the ICCPR did not fully conform to the U.S. Constitution when the United Nations adopted it in 1966.[64]

B. The Content of the ICCPR

The ICCPR consists of forty-seven articles that are designed to protect:

> [L]ife, integrity, liberty and security of the human person; the rights with respect to the administration of justice; the right to privacy; the rights to freedom of religion or belief and to freedom of opinion and expression; freedom of movement; the right to assembly and association; and the right to political participation.[65]

The treaty lists five basic control mechanisms to encourage compliance;[66]

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62. *See id.* (connecting U.S. efforts to impart human rights standards in Axis countries with President Roosevelt's plans to establish the "Four Freedoms" worldwide). Though the ICCPR was originally planned to instill human rights in Axis countries, the Senate Foreign Affairs Committee ratified the Covenant with the hope of promoting "democratic values and the rule of law, not only in Eastern Europe and the successor states of the Soviet Union but also . . . in Africa and Asia." Senate Comm. on Foreign Relations, *supra* note 23, at 649.

63. *See, e.g.*, Anthony Lester QC, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 539 (1988) (describing how the United States and its Bill of Rights exerted significant influence on the development of the United Nations Covenant on Human Rights).

64. Senate Comm. on Foreign Relations, *supra* note 23, at 648, 650 (reporting that the United Nations General Assembly unanimously adopted the ICCPR on December 16, 1966). Although most of the Covenant's provisions are compatible with U.S. law, divergence still exists. For example, Article 19 of the ICCPR guarantees the right to free speech and expression, yet allows states to restrict this right in order to protect national security and stop the spread of racial and religious hatred. *Id.* The Senate Committee on Foreign Relations declared these exceptions as inconsistent with the free speech guarantees of the U.S. Constitution. *See id.*

65. Ann Fagan Ginger, *The Energizing Effect on Enforcing a Human Rights Treaty*, 42 DEPAUL L. REV. 1341, 1358 (1993) (quoting Theo Van Boven, *The International System of Human Rights: An Overview*, *in* MANUAL ON HUMAN RIGHTS REPORTING at 4, U.N. Doc. AR/Pub/91/1, U.N. Sales No. E.91. xiv.1 (1991)).

66. *See generally id.* at 1358-72 (noting that compliance is monitored through the use of five reporting functions that must be performed by contracting parties to the ICCPR). Parties to the ICCPR must: (1) familiarize those domestic authorities responsible for enforcing the ICCPR with the treaty's requirements; (2) report to the Human Rights Committee about the progress made in enforcing the treaty; (3) detail any problems with the implementation of ICCPR standards; (4) provide representatives to answer questions on submitted reports; and (5) submit reports on problems and implementation in five-year

apart from these mechanisms, each state has an underlying duty to recognize the rights recognized in the ICCPR.[67]

C. United States's Ratification of the ICCPR

The United States did not ratify the ICCPR until 1992.[68] Although President Carter signed the Covenant in 1977 and sent it to the Senate for consent and ratification in 1978, the Senate did not act on the treaty during the Carter and Reagan administrations.[69] Upon the urging of President Bush, however, the Senate ratified the treaty in 1992.[70] The Senate qualified its signature with the significant and controversial "reservations,"[71] "declarations,"[72] and "understanding[s],"[73] suggested by the

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intervals. *See id.* at 1358-59.

67. *Id.* at 1359.

68. *See* Posner & Spiro, *supra* note 61, at 1209. The former Executive Director of the American Civil Liberties Union noted that:

> One reason that it took so long for the United States to become a party to the International Covenant on Civil and Political Rights . . . is that ratification never became an important issue on the agenda of the many organizations devoted to the protection of civil rights and civil liberties within the United States.

Areh Neier, *Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1233, 1233 (1993). Neier attributes this lack of interest to "the view that the protection of liberty within the United States would not be noticeably affected by international agreements, regardless of whether the United States became a party to them." *Id.*

69. Senate Comm. on Foreign Relations, *supra* note 23, at 649 (pointing out that although President Carter transmitted the Covenant to the Senate during his term, the Soviet invasion of Afghanistan and the Iran hostage crisis preoccupied the Committee). The Committee also noted that President Reagan "did not indicate any interest in ratifying the Covenant." *Id.*

70. *See id.*

71. *Id.* at 646. The United States attached a total of five reservations to the ICCPR. *See id.* The United States attached reservations to: Article 20, which restricts speech in circumstances not proscribed by the First Amendment; Article 6, which prohibits the execution of minors; Article 7, which potentially provides protections beyond the 5th, 8th, and 14th Amendments to the U.S. Constitution; Article 15, paragraph 1, which requires that subsequently enacted sentencing laws be applied retroactively if they are favorable to offenders; and Article 10, paragraphs 2(b) and 3, which require the penal separation of adults and juveniles. *See id.* A reservation is defined as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, para. 1(d), 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (entered into force Jan. 27, 1980).

72. Senate Comm. on Foreign Relations, *supra* note 23, at 646-47. The United States attached a total of four declarations. *See id.* The first declaration states that rights and prohibitions of articles 1-27 are not self-executing. *See id.* The second declaration urged parties to the ICCPR to refrain from enacting limitations on speech. *See id.* The third declaration recognized the competence of the Human Rights Committee. *See id.* The fourth declaration stated that other international principles may restrict the rights recog-

Bush administration.[74]

D. The Response to United States's Ratification of the ICCPR

The Senate reservations to the ICCPR exempted the United States from the treaty's enforcement methods, as well as specific ICCPR provisions, including the ban on the juvenile death penalty.[75] Human rights groups,[76] U.N. bodies,[77] and other nations[78] have criticized the unique reservations.[79] Criticisms focus on the idea that although the ICCPR pur-

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nized in the ICCPR. *See id.*

73. *Id.* at 646. The United States articulated five understandings. *See id.* The first understanding clarified that the United States did not interpret age discrimination to be against the Covenant. *See id.* The second stated that the right to seek compensation for illegal arrest would not be interpreted as the right to receive compensation. *See id.* The third stated that the accused need not always be separated from the convicted. *See id.* The fourth stated that indigents are guaranteed counsel, but not choice of counsel. *See id.* The fifth stated that principles of Federalism prevented the United States from fully complying with the treaty at the state and local levels. *See id.*

74. *See id.* at 649 (attributing the conditions placed upon the United States ratification of ICCPR to proposals put forth by President George Bush). It should be noted that the United States did not attach reservations to all parts of the Covenant that differed or went beyond the protections of the Constitution. *See* Neier, *supra* note 68, at 1237 (listing 11 parts of the ICCPR that go beyond the protections of the U.S. Constitution, but were not objected to in the Senate's ratification of the Covenant).

75. *See supra* notes 71-74 and accompanying text (describing the United States's reservations, declarations, and understandings). The United States stated that it was necessary to attach reservations, understandings, and declarations "in order to ensure that the United States can fulfill its obligations under the Covenant in a manner consistent with the U.S. Constitution." Senate Comm. on Foreign Relations, *supra* note 23, at 653.

76. See, e.g., Brief of Amici Curiae in Support of Petitioner, Domingues v. Nevada, 102 S. Ct. 396 (1998) (No. 98-8327) [hereinafter Brief of Amici Curiae], which was filed on behalf of the Human Rights Advocates and the Minnesota Advocates for Human Rights; *see also* Jackson, *supra* note 5, at 409 & n.122 (discussing the array of organizations that have voiced opposition to U.S. death penalty practices).

77. *See Human Rights Committee Concludes Consideration of Initial Report of the United States*, Hum. Rts. Comm., 53d Sess., 1406th mtg., at 2, U.N. Doc. HR/CT/405 (1995), *available in* <gopher://gopher.undp.org:70/00/uncurr/press_releases/HR/CT/95_03/405> (stating that the U.S. reservation to Article 6 is contrary to the object and purpose of the Covenant).

78. *See* Edward F. Sherman, Jr., Note, *The Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69, 72 & n.15 (1994) (noting that the Netherlands, Finland, Germany, Denmark, Norway, Belgium, Portugal, Italy, and Spain objected to the United States's reservations on the ground that the reservations were incompatible with the ICCPR's object and purpose).

79. *See* David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1192 (1993) (noting that although over 40 other parties to the Covenant accompanied their ratifications with reservations, the United States is one of three nations to attach a reservation to Article 6, which prohibits the execution of juvenile offenders). Only Ireland and the Netherlands also attached reservations to article 60. *See*

portedly advances human rights,[80] the attached reservations disregard the very essence of the treaty.[81]

Some argue that reservations to any human rights treaty are unsatisfactory because "the incentive for states to change their domestic policies to conform with international human rights standards is removed, ultimately resulting in the loss of the standard's legitimacy."[82] To guard the legitimacy of human rights standards, these critics and others suggest that despite Senate reservations, the United States should be bound by the entire ICCPR.[83]

III. THE DIFFICULT TASK OF DETERMINING THE VALIDITY OF THE UNITED STATES'S RESERVATIONS TO THE ICCPR

Traditionally, a state's reservation to a treaty was valid only if all other treaty members unanimously approved of the reservation.[84] Today, how-

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Schabas, *Invalid Reservations*, *supra* note 8, at 291.

80. *See* ICCPR, *supra* note 16, at 171 (characterizing the Covenant as promoting "the inherent dignity and . . . the equal and inalienable rights of all members of the human family").

81. *See generally* G. Fitzmaurice, *Reservations to Multilateral Conventions*, 2 INT'L & COMP. L.Q. 1 (1953) (arguing that reservations defeat the objective of treaties because states may tailor their acceptances in ways that do not compel them to enact any meaningful change in policy); *see also* Loschin, *supra* note 58, at 148 ("The availability of reservations and understandings has undercut the goal of creating truly universal law."). *But see* Daniel N. Hylton, Note, *Default Breakdown: The Vienna Convention on the Law of Treaties, Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419, 428 (1994) (illustrating, though not supporting, the idea that a system of reservations, as opposed to the unanimity rule, protects the right of a sovereign state to avoid compromising its power).

82. Sherman, *supra* note 78, at 71. Others have noted that the United States should not be considered a genuine human rights leader until it removes its reservations to the ICCPR. *See, e.g.*, M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1171 (1993).

83. *See, e.g.*, Brief of Amici Curiae, *supra* note 76, at 89 (arguing that U.S. reservations to the ICCPR do not excuse the country from its obligation to comply with all of the ICCPR provisions); *see also, e.g.*, Schabas, *Invalid Reservations*, *supra* note 8, at 324 (pointing to international sources of law to suggest that "the United States is bound at law by the Covenant as a whole").

84. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 31-34 (May 28) [hereinafter Genocide Convention Case] (Guerrero, McNair, Read, Mo, J.J., dissenting) (supporting their objections to the flexible reservation system by citing a variety of traditional sources in international law that have recognized the unanimity rule); ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES, BRITISH PRACTICE AND OPINIONS 106 (1938) (stating the importance of all parties to a treaty assenting to a reservation before the reservation is acceptable). For a thorough description of the history of the unanimity rule, see Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 289, 291 (1991). Clark notes that some sources have exaggerated

ever, international standards recognize methods by which reservations may become valid without the unanimous approval of all treaty members.[85] The ICCPR does not address the permissibility of reservations, and consequently, the Covenant itself offers no guidance to states seeking to evaluate the legitimacy of the United States's reservations.[86] Because international customary law tends to lack predictability,[87] the Vienna Convention on the Law of Treaties is generally accepted as the most relevant authority on the validity of reservations.[88] Whether the Vienna Convention truly provides any more certainty than international customary law is debatable.[89]

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the role of the unanimity rule in traditional treaty law, overlooking that the idea was never truly accepted as international law in the Americas or Eastern Europe. *See id.* at 291.

85. *See* Clark, *supra* note 84, at 289 (discussing how a "flexible approach" emerged as a trend in international treaty making). The unanimity rule may have officially faded when the International Court of Justice, addressing a reservation to the Genocide Convention in an advisory opinion, declared that in the interest of wide participation, a flexible approach to treaty making is appropriate. *See generally* Genocide Convention Case, *supra* note 84, at 15-30. The United Nations General Assembly eventually adopted the position of the International Court of Justice when it affirmed the use of a flexible approach to treaty making in the Vienna Convention. *See* Sherman, *supra* note 78, at 77.

86. *See* General Comment No. 24 (52) Relating to Reservations, U.N. GAOR Hum. Rts. Comm., 52d Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter General Comment No. 24 (52)] ("The Covenant neither prohibits reservations nor mentions any type of permitted reservation.").

87. *See* Glaniville L. Williams, Ph.D, *International Law and the Controversy Concerning the Word "Law,"* 22 BRIT. Y.B. INT'L L. 146 (1945) (explaining how international common law often encompasses varying and even opposing standards because there is no structured authority or comprehensive body of case law); *see also* Lauren B. Kallins, Comment, *The Juvenile Death Penalty: Is the United States in Contravention of International Law?*, 17 MD. J. INT'L L. & TRADE 77, 93 (1993) (arguing that customary international law is difficult to define, in part because it is "an area of law based not on principles which have been studied, debated, clearly articulated and ultimately adopted by member States"); Sherman, *supra* note 78, at 71 (arguing that customary international law and the rules governing treaty-making "are unclear" and thus "almost invariably give way to political considerations"). Sherman also notes that "it is not always clear which practices create rules of customary international law." *Id.* at 85.

88. *See* General Comment No. 24 (52), *supra* note 86, at 465 ("[T]he absence of a prohibition on reservations does not mean that any reservation is permitted . . . [as] the Vienna Convention of the Law of Treaties provides relevant guidance."). During a United Nations conference on the law of treaties, the Legal Advisor to the State Department declared that the United States "consistently applied" the terms of the Vienna Convention "which constitute a codification of customary international law." Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 75 AM. J. INT'L L. 142, 147 (1981) (citing *Commentary of the International Law Commission, United Nations Conference on the Law of Treaties* A/Conf.39/11/Add.2, at 38 (1971)). It should also be pointed out, however, that although the U.S. government has recognized the stature of the Convention, the Senate has not ratified it. *See id.*

89. *See* Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 509 (1970) (describing how conference attendees failed to agree on a reserva-

A. The Vienna Convention and the Ambiguity Surrounding the Validity of Reservations

The Vienna Convention is the product of the United Nations' attempt to codify the law of treaties—essentially the treaty on treaties.[90] As such, the Vienna Convention "purports to constitute a comprehensive set of principles and rules governing all the most significant aspects of the law of treaties."[91]

Under the Vienna Convention, reservations to treaties are permissible unless the treaty expressly prohibits the reservations[92] or if such reservations contravene the treaty's "object and purpose."[93] Because the ICCPR does not expressly prohibit reservations,[94] the U.S. death penalty reservation is invalid only if it is contrary to the "object and purpose" of the ICCPR.[95]

According to the Vienna Convention, individual states must determine whether the reservations of other states violate the "object and purpose" of a treaty.[96] The problem, however, is that the Vienna Convention does not provide a methodology or list of factors that should be used to evaluate whether a reservation violates the "object and purpose" of a given treaty.[97] In the case of the ICCPR, this omission is particularly problem-

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tion policy, and thus left the issue unsettled); *see also* Sherman, *supra* note 78, at 72 (declaring that under the Vienna Convention, questions about the legitimacy of reservations are difficult, contentious, without any guidance, and nearly impossible to resolve).

90. *See* I.M. SINCLAIR, C.M.G. THE VIENNA CONVENTION ON THE LAW OF TREATIES 1-6 (1973).

91. *Id.* at 6.

92. *See* Vienna Convention, *supra* note 71, arts. 19(a), (b) (stating that a treaty may either prohibit all reservations or only reservations to specific provisions). An example of a treaty that expressly prohibits reservations is Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty. *See* William Schabas, *Reservations to Human Rights Treaties: Time for Innovation and Reform*, 32 CAN. Y.B. INT'L L. 39, 46 (1994) [hereinafter Schabas, *Reservations*].

93. Vienna Convention, *supra* note 71, art. 19(c) (stating that reservations that are not expressly prohibited may still be invalidated if they are incompatible with a treaty's object and purpose).

94. *See* General Comment No. 24 (52), *supra* note 86, at 465.

95. Brief of Amici Curiae, *supra* note 76, at 8.

96. Vienna Convention, *supra* note 71, art. 21(3) ("When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.").

97. Sherman, *supra* note 78, at 84; *see also* Hylton, *supra* note 81, at 430 ("The Vienna Convention addressed all reservations as one class. Article 19(c) created a distinction only between those reservations that are or are not compatible 'with the object and purpose of the treaty.' Nowhere in the Convention did the drafters specify the criteria necessary to determine compatibility."). Surprisingly, or perhaps in recognition of the

atic because the ICCPR does not explicitly identify its object and purpose.[98] Given the lack of guidance available to individual states, the Human Rights Committee (Committee)[99] has suggested that the ambiguity can be resolved if it assumes the task of providing and interpreting the standards needed to interpret the Vienna Convention's "object and purpose" language.[100]

B. The Human Rights Committee: Leviathan or Mere Advisor?

Support for the Human Rights Committee's assumption of power comes from the Committee itself.[101] The Committee has declared that "[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose" of the ICCPR.[102] Under Article 40 of the ICCPR, the Commission is to receive reports from state parties that detail the progress that has been made on the implementation of treaty provisions.[103] After studying these reports, the Commission transmits them to other states and attaches whatever general comments it considers necessary.[104]

Article 40 of the ICCPR does not include any provisions that address the need for the Committee to consider the compatibility of reserva-

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Convention's hazy status, in *Domingues*, the plaintiff's attorneys did not suggest any factors to be used to ascertain whether U.S. death penalty reservations contravened the ICCPR's purpose. *See* Respondent's Brief in Opposition at 19, Domingues v. Nevada, 120 S. Ct. 396 (1999) (No. 98-8327) [hereinafter Respondent's Brief in Opposition] (drawing attention to the fact that the petitioner failed "to analyze or even state how a reservation is determined to be incompatible with the object and purpose [of] a treaty").

98. *See generally* ICCPR, *supra* note 16. It should be added that it is common for a treaty not to present a cohesive package of its objects and purposes. *See* Schabas, *Reservations*, *supra note* 92, at 47 (observing that "it is not normal practice in treaty drafting to spell out the 'object and purpose' as if one were defining technical terms").

99. *See generally* ICCPR, *supra* note 16, arts. 28-45 (describing the composition and responsibilities of the Committee). The Human Rights Committee is a group of 18 independent experts established under Article 28 of the ICCPR to monitor the compliance of member states. *See id.* art. 28(1). In *Domingues*, the defendant's brief appears to argue that upon the authority and conclusions of the Human Rights Committee, the U.S. reservations are invalid. *See* Brief of Amici Curiae, *supra* note 76, at 9.

100. General Comment No. 24 (52), *supra* note 86, para. 8 (discussing the inadequacy of current treaty law surrounding reservations and plans to use international law to discern the meaning of the Vienna Convention's "object and purpose" language).

101. *See id.* para. 18.

102. *Id.*

103. ICCPR, *supra* note 16, art. 40(1). Under Section 40(1)(a) & (b), these reports must be submitted within one year from the date when the treaty is entered into force, or whenever the Human Rights Committee requests. *See id.* The United States, however, did not submit a report to the Committee until 1995, four years after the United States ratified the Convention. *See* Schabas, *Invalid Reservations*, *supra* note 8, at 278.

104. *See* ICCPR, *supra* note 16, art. 40(4).

tions.[105] Nonetheless, according to the Committee, "[i]n order to know the scope of its duty to examine a State's compliance under Article 40 . . . the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant."[106] Not only must the Committee take a view, but also, according to the Committee, the view that it takes must be the definitive authority that prevails over the determinations of all other treaty parties.[107]

According to the United States, the Human Rights Committee's position grants powers far more expansive than those granted by the ICCPR.[108] The United States has expressed the view that the ICCPR "does not impose on States Parties an obligation to give effect to the Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant."[109] In addition to exceeding its grant of power, the United States has also claimed that the Committee's assertions are contrary to the Vienna Convention that gave birth to the "object and purpose" standard.[110] Even if one assumes that the Human Rights Committee, rather than individual states, should have the power to rule on the validity of reservations, it is still necessary to question the Committee's proposed method for determining

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105. *Id.* art. 40.

106. General Comment No. 24 (52), *supra* note 86, para. 18.

107. *See id.* para. 17 (stating that the objections or lack of objections by party members may provide some guidance to the Commission, but alone are insufficient to determine the validity of a reservation).

108. *See Observations by the Governments of the United States and the United Kingdom on General Comments No. 24 (52)*, 16 HUM. RTS. L.J. 422 ¶ 1 (1995) [hereinafter *Observations by the Governments*] (declaring the Committee's assertion of power to be a "significant departure from the Covenant scheme"). The United States consented to the power of the Human Rights Committee "to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant." 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992). It should also be noted that the United States was not alone in its objections to the assumed powers asserted by the Human Rights Committee. *See Observations by the Governments*, *supra*, at 425. The United Kingdom asserted that even if the Vienna Convention provides an inadequate solution to the problem of reservations, "this would not of itself give rise to a competence or power in the Committee except to the extent provided for in the Covenant." *Id.* para. 12.

109. *Observations by the Governments*, *supra* note 108, § 1. Again, the United Kingdom sided with the United States and stated that "[n]o conclusion as to the status or consequences of a particular reservation" can be determinative without presupposing that "the Parties had undertaken in proper form a prior legal obligation to accept it." General Comment No. 24 (52), *supra* note 86, at 425 para. 12.

110. *Observations by the Governments*, *supra* note 108, § 1 (stating that the Committee's position is a rejection of "the established rules of interpretation of treaties as set forth in the Vienna Convention on the law of Treaties and in customary international law").

the validity of a reservation to the ICCPR.[111]

C. Using International Customary Norms to Identify the "Object and Purpose" of the ICCPR

Speaking through the same General Comment that addressed its competency to rule on the validity of a reservation, the Committee asserted that all treaty provisions that are international norms are also necessarily related to the ICCPR's purpose and are thus exempt from reservations.[112] According to the Committee, a prohibition becomes an international norm when it is recognized as both "state practice" and "*opinio juris*."[113] The widespread prohibition of an action will evidence state practice.[114] For a prohibition to achieve *opinio juris* status, however, states must not only prohibit a certain practice; they must prohibit that practice because they believe it to be against international law.[115] For example, *opinio juris* would not be established if states prohibited a practice because of domestic concerns.[116]

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111. One method that has been suggested, but will not be extensively examined in this Comment, includes the substantive/non-substantive division. *See* Schabas, *Invalid Reservations*, *supra* note 8, at 291-93. This approach, described by Schabas as the "extreme view," holds that a reservation to any substantive provision necessarily violates a treaty's "object and purpose" and thus only procedural provisions may be the subject of reservation. *Id.* at 292. A concurring International Court of Justice member in *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988) took this view. *See id.* at 292. State practice, the decisions of the International Court of Justice, the Human Rights Committee, and the Inter-American Commission of Human Rights, however, have all recognized that reservations to substantive provisions are not *per se* violations of a treaty's object and purpose. *See id.* Because such a strong consensus is well established, the substantive/non-substantive position will not be examined in this Comment.

112. General Comment No. 24 (52), *supra* note 86, paras. 6-8. According to the object and purpose test of the Vienna Convention, "provisions in the Covenant that represent customary international law . . . may not be the subject of reservations." *Id.* para 8.

113. de la Vega & Brown, *supra* note 8, at 756.

114. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (1966). To those who are skeptical of power wielded by the Human Rights Committee, it should be noted that ascertaining "wide-spread state practice" will necessarily anoint the Committee with significant discretion. *E.g.*, Kallins, *supra* note 87, at 93 (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, which acknowledges the difficulty in determining at what point a custom turns into law and the fact that "'there is no precise formula to indicate how widespread a practice must be'" before it becomes law).

115. *See* BROWNLIE, *supra* note 114, at 7 (pointing out that in order to qualify as *opinio juris*, state practice must emanate from a "sense of legal obligation, as opposed to motives of courtesy, fairness, or morality"). Much like "state practice," determining *opinio juris* is a relatively standardless process that will leave the Human Rights Committee with a significant amount of discretion. Kallins, *supra* note 87, at 95-96 (indicating that the "psychological component" makes the *opinio juris* determination "elusive").

116. *See* Kallins, *supra* note 87, at 95-96. Because of this emphasis on the motivations

If the above analysis were employed, the legitimacy of the U.S. death penalty reservations would depend on whether Article 6 of the ICCPR, which prohibits the juvenile death penalty, reiterates principles that are already recognized as international norms.[117] In a context separate from the question of ICCPR's purpose, Domingues argued this point when he asserted that Article 6 merely codifies pre-existing international norms.[118]

The Brief of Amici Curiae filed in support of Domingues argued that the prohibition of the juvenile death penalty developed into a customary international norm when the prohibition became both "state practice" and "*opinio juris*."[119] To evidence state practice, Domingues pointed out that at the time of his trial only six countries enforced the juvenile death penalty.[120] The persuasiveness of this figure was certainly bolstered by the observation that in 1998, when the United States executed three juvenile offenders, it was the only state in the world to execute any juvenile offender.[121] To evidence *opinio juris*, Domingues listed numerous international treaties prohibiting the execution of juvenile offenders.[122] Even

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behind a state action, *opinio juris* has been referred to as the "subjective or "psychological component" of a customary law analysis. *Id.* Detecting a state's motivation can often be a difficult and confusing task, and as a result, some have argued that inquiries into the existence of *opinio juris* are destined to be guesswork. *See id.*

117. *See* General Comment No. 24 (52), *supra* note 86, para. 8 (stating that because tenets of customary international law are exempt from reservations by ICCPR members, among other things "a State may not reserve the right to . . . execute pregnant women or children.") According to the Human Rights Committee, states would violate customary international law if they reserved the right:

> [T]o engage in slavery, to torture, to subject persons to cruel [and unusual] punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence . . . to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.

Id.

118. *See* Brief of Amici Curiae, *supra* note 76, at 11. Domingues argued that aside from violating the ICCPR, the mere fact that permitting the execution of minors violated customary international law was sufficient to overturn his sentence. *See id.* at 11-15.

119. *Id.* at 13.

120. *See, e.g., id.* at 11. The fact that only six nations allow the execution of juvenile offenders apparently weighed heavily on Chief Justice Springer, who specifically mentioned this anomaly in his five-four-sentence dissent. *See* Domingues v. Nevada, 961 P.2d 1279, 1280-81 (Nev. 1998) (Springer, C.J., dissenting), *cert. denied*, 120 S. Ct. 396 (1999).

121. *See* Brief of Amici Curiae, *supra* note 76, at 4 (citing Victor Streib, *Death Sentences and Executions for Juvenile Crimes, January 1973-October 1998*, at 3, 4, tbl.1 (last modified Oct. 31, 1998) <http:www.law.onu.edu/faculty/Streib/ juvdeath.pdf>).

122. *See id.* at 12 (listing The Convention on the Rights of the Child, The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and The American Convention on Human Rights).

if the prohibition of the juvenile death penalty can be regarded as customary international law, a premise to which strong opposition exists,[123] the frameworks proposed by Domingues and the Committee fail to recognize a doctrine that exempts the United States from the prohibition: the "persistent objector doctrine."[124] In order to preserve the values of consent and state sovereignty, under the "persistent objector doctrine," some states may be exempt from customary laws that otherwise bind other states.[125]

To be recognized as a persistent objector, a state must continually and consistently object to the attempted enforcement of a specific international norm.[126] Under this doctrine, even if the prohibition of the execution of minors is customary international law, the norm would only bind the United States if it has not continually and consistently objected to the norm.[127]

Although the persistent objector doctrine is generally accepted as legitimate,[128] states have rarely sought protection under the doctrine.[129] Consequently, there is little case law shedding light on how the doctrine

123. *See generally* Kallins, *supra* note 87, at 93-98. Kallins argues that depending upon how one interprets "wide spread" and gathers consensus on each state's penal code, the prohibition on the juvenile death penalty may not qualify as a state practice. *Id.* (noting that some judges have interpreted "wide spread" as requiring unanimity). Kallins also argues that the *opinio juris* argument lacks support because "neither U.S. legislatures nor courts articulate an express reliance on international norms in setting a minimum age at which the death penalty may be imposed." *Id.* at 97.

124. *See generally* General Comment No. 24 (52), *supra* note 86 (making no mention of the persistent objector doctrine); Brief of Amici Curiae, *supra* note 76 (also making no mention of the persistent objector doctrine).

125. Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. OF INT'L L. 1, 4-5 (1986). Charney attributes the rise of the persistent objector doctrine in part to Western States and their fear that international law is evolving in a way that clashes with Western values. *See id.* As such, the persistent objector rule serves as a safety valve for these nations. *See id.* Charney also notes that the doctrine reflects an emphasis on state sovereignty and the idea that a state should only be bound to that which it expressly consents. *See id.*

126. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d ("[I]n principle a dissenting state which indicates its dissent from a practice while the law is still in the process of development is not bound by that rule of law even after it matures.").

127. *See* Loschin, *supra* note 58, at 169-71 (applying a persistent objector analysis to the United States and its approach to the juvenile death penalty).

128. *See* Charney, *supra* note 125, at 2 (revealing that "virtually all authorities maintain that a State which objects to an evolving rule of general customary international law can be exempted from its obligations").

129. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (pointing out that the persistent objector doctrine has rarely been applied).

should be applied.[130] With limited exceptions, however, most evidence indicates that the United States has consistently and continually recognized the legitimacy of executing minors and thus should qualify as a persistent objector.[131]

Domestically, the majority of American state legislatures that retain the death penalty also retain the penalty for juvenile offenders.[132] Although the Supreme Court's *Thompson* decision prevents states from executing offenders who were younger than sixteen at the time of their crime, the Court has never fully banned all executions of juvenile offenders.[133] Indeed, the execution of juvenile offenders has been an ever-present element in the U.S. judicial system since well before the 1700s.[134]

The United States has ratified only one treaty that has restricted its execution of juvenile offenders.[135] That treaty, however, placed limitations on the penalty only in a wartime context.[136] Outside of this very specific and limited exception, the United States has not ratified a single treaty that has restricted its ability to execute juvenile offenders.[137] Furthermore, the United States has opposed efforts to include anti-death penalty provisions in more than one treaty, including the ICCPR.[138]

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130. *See* Loschin, *supra* note 58, at 152 (noting that only two International Court of Justice decisions discuss the persistent objector doctrine).

131. *See* Thompson v. Oklahoma, 487 U.S. 815, 864 (Scalia, J., dissenting) (citing Anglo-American sources and case law from before and after the writing of the Constitution that supports the legitimacy of the juvenile death penalty); *see generally* Gasparini, *supra* note 4 (detailing the United States's long history of juvenile executions).

132. *See Juvenile Offenders* (last updated 08/09/99) <*http://www.agitator.com/dp/juveniles/index.html*> (revealing that of the 38 states in which the death penalty is legal, 24 permit the execution of minors).

133. *See supra* notes 49-56 and accompanying text (describing that Stanford v. Kentucky, 492 U.S. 361 (1989) upheld a Kentucky statute that allowed the execution of juveniles who were at least 16 years old at the time of their crimes).

134. *See generally, e.g.*, Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613 (1983) (describing the United States and its long history of using the death penalty to punish juvenile offenders).

135. *See* Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 286 [hereinafter Geneva Wartime Convention]. One scholar has asserted that a state's reluctance to ratify a treaty amounts to a rejection of the treaty. *See* Kallins, *supra* note 87, at 97.

136. *See generally* Geneva Wartime Convention, *supra* note 135, arts. 68 & 75 (prohibiting the execution of prisoners of war who are under the age of 18).

137. *See* Nanda, *supra* note 4, at 1330 (pointing out that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War is the only treaty ratified by the United States that prohibits the execution of minors); *see also* Loschin, *supra* note 58, at 169 (concluding that except for the Fourth Geneva Wartime Convention, the United States has not bound itself to any international treaty that prohibits the death penalty).

138. *See* Case 9647, INTER-AM. Y.B. ON HUM. RTS. 260, 284 (1987) (stating that the

Thus, even if the ICCPR provision that prohibits the execution of juvenile offenders is customary law—consequently a provision related to the ICCPR's "object and purpose" according to the Human Rights Committee—as a persistent objector, the U.S. reservation is valid.[139]

D. Using Non-Derogeable Status to Identify Provisions That Are Related to a Treaty's "Object and Purpose"

Although the Human Rights Committee advocated a customary international law analysis to determine if an ICCPR provision pertains to the treaty's overall purpose, a portion of the Committee's General Comment maintained that another test may also be useful, though not definitive.[140] This portion of the General Comment asserted that resolution of what constitutes an invalid reservation will be clarified if provisions are divided into derogeable and non-derogeable categories.[141]

Non-derogeable provisions are provisions designated by treaty makers to be "so fundamental and so essential that they brook no exception, even in emergency situations."[142] Once parties ratify a treaty, they are bound to the treaty's non-derogeable provisions regardless of what circumstances might arise subsequent to the treaty's ratification.[143] From the perspective of some committee members, non-derogeable provisions

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United States opposed the death penalty restrictions included in the American Convention and the ICCPR); *see also* Kallins, *supra* note 87, at 99-100 (providing a thorough history of the United States's opposition to Article 4 of the ICCPR).

139. *See* Case 9647, *supra* note 138, at 298, para. 54 (holding that because the United States has protested the norm prohibiting juvenile death penalty, it is not bound by the norm even if it were found to exist).

140. General Comment No. 24 (52), *supra* note 86, para. 10 ("While there is no automatic correlation between reservations to non-derogeable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.").

141. *Id.* An advisory opinion from the Inter-American Commission of Human Rights supports the use of non-derogeable provisions to decipher the essential provisions that preserve a treaty's object and purpose. *See* Sherman, *supra* note 78, at 79. When ruling on the Guatemalan death penalty reservation, the Inter-American Commission of Human Rights declared that because the right to life was designated as non-derogeable, it is incompatible with the object and purpose of the Convention, and consequently, not permitted. *See id.* (citing *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights*); Advisory Opinion No. OC-3/83 of Sept. 8, 1983, Inter-Am. C.H.R., ser. A: Judgments and Opinions, No. 3 (1983), *reprinted in* 23 I.L.M. 320, 341 (1984)). While the Human Rights Committee recognizes a link between the ICCPR's purpose and non-derogeable provisions, the Inter-American Court on Human Rights suggests that the two are analytically equivalent. *See id.*

142. Schabas, *Invalid Reservations*, *supra* note 8, at 293.

143. *See* ICCPR, *supra* note 16, art. 4 (describing what non-derogation entails in the context of ICCPR provisions).

are necessarily related to a treaty's "object and purpose."[144] This argument assumes that if treaty makers willingly designate certain provisions as permitting no permutation or exception upon ratification, then surely these treaty makers recognize the same provisions as so integral to a treaty's overall purpose that they bar reservation.[145]

Because the U.S. reservations to ICCPR death penalty provisions were designated as non-derogeable, this approach would certainly be advantageous to defendants in Domingues's position.[146] This approach, however, overlooks the fact that treaty makers designate many provisions as non-derogeable for reasons unrelated to their general importance.[147] The Human Rights Committee and other international organizations have pointed out that some provisions are designated as non-derogeable simply because their suspension would be irrelevant to a state maintaining power in a crisis situation, not because the provision's importance warrants no exception.[148] Other provisions are non-derogeable because they cannot be enforced or controlled.[149] Because non-derogeable status may signify varying objectives, non-derogeable provisions are not necessarily related to a treaty's "object and purpose."[150] Therefore, the fact that the United States attached reservations to non-derogeable provisions indicates little about the validity of these reservations.[151]

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144. Schabas, *Invalid Reservations*, *supra* note 8, at 294.

145. *See id.* Other arguments, however, do not suggest that such an inference is necessary and instead assert that by its very definition, a non-derogeable provision does not allow reservations. *See* Sherman, *supra* note 78, at 70 (declaring that U.S. death penalty reservations are "contrary to Article 5's nonderogable language").

146. *See* ICCPR, *supra* note 16, art. 4(1)-(2) (noting that articles 6, 7, 8 (paragraphs 1 & 2), 11, 15, 16, and 18 do not allow derogation even in times of public emergencies). In his dissent in *Domingues*, Justice Rose cited the non-derogeable provision in Article 6 as authority supporting the position that the United States's reservation was invalid. Domingues v. Nevada, 961 P.2d 1279, 1281 (Nev. 1998) (Rose, J., dissenting), *cert. denied*, 120 S. Ct. 396 (1999).

147. *See* General Comment No. 24 (52), *supra* note 86, at 465, para. 10.

148. *See id.* (listing Articles 10 & 11, which forbid imprisonment for debt, as examples of non-derogeable provisions that are designated as such because they are unrelated to the control of a state during an emergency situation).

149. *See id.* (providing the ICCPR's freedom of conscience protection as an example of a provision that has been designated as non-derogeable simply because it is unenforceable).

150. *Id.* While noting that using non-derogeable status to identify vital provisions is overinclusive, the Committee also pointed out that it is underinclusive in some circumstances. *See id.* The Committee pointed out that "not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogeable." *Id.*

151. *See* Brief of Amici Curiae, *supra* note 76, at 13.

IV. CONSEQUENCES OF AN INVALID RESERVATION: SEVERABLE OR NON-SEVERABLE?

If a U.S. court were to hold that the United States's reservation to the ICCPR provision is invalid, the consequences of such a holding would be unclear.[152] It is possible that the United States would remain a party to the ICCPR and maintain the benefit of the reservation, despite its invalidity.[153] It is possible that the United States would lose its status as a party to the ICCPR, which would allow the country to execute juvenile offenders but prevent it from using the ICCPR as a way to influence the human rights practices of other countries.[154] It is also possible that the United States would be bound by the ICCPR provisions to which the country attached its invalid reservations.[155]

Traditionally, international authorities have advocated a contract analysis to determine the appropriate response to an invalid reservation.[156] Under the contract analysis of treaty reservations, codified by the Vienna Convention, if a party protests that a state's reservation is inva-

152. *Compare Observations by the Governments*, *supra* note 108, at 423-24, para. 5 (declaring that invalid reservations are not severable from a state's consent), *with* General Comment No. 24 (52), *supra* note 86, para. 18 (stating that invalid reservations are severable from a state's consent).

153. *See* Vienna Convention, *supra* note 71, art. 20, para. 4(b).

154. *See* Domingues v. Nevada, 961 P.2d 1279, 1281 (Nev. 1998) (Rose, J., dissenting) (citing Schabas, *Invalid Reservations*, *supra* note 8, at 318-19, and declaring that "[i]f the reservation was a 'sine qua non' of the acceptance of the whole treaty by the United States, then the United State's [sic] ratification of the treaty could be considered a nullity"), *cert. denied*, 120 S. Ct. 396 (1999).

155. *See id.* (Rose, J., dissenting) (recognizing that if the United States made invalid reservations, it may be bound by provisions to which it placed reservations). Rose stated that "if the United States has shown an intent to accept the treaty as a whole, the result could be that the United States is bound by all of the provisions of the treaty, notwithstanding the reservation." *Id.* (Rose, J., dissenting) (citing Schabas, *Invalid Reservations*, *supra* note 8, at 318-19). Domingues needed to establish that in light of an invalid reservation by the Senate, the United States should be bound to the entire ICCPR without the benefit of any reservations. *See id.* (Rose, J., dissenting).

156. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract."); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 456 (Robert W. Tucker ed., 2d ed.) (1952) ("A treaty, like a contract, is a legal transaction by which the contracting parties intend to establish mutual obligations and rights."); MCNAIR, *supra* note 84, at 105 (admitting that while the analogy between treaties and contracts is sometimes overemphasized, it is nonetheless true that "in solving the problems to which the practice of attaching reservations to the signature or ratification of treaties give rise, the analogy [to treaties] has been found useful").

lid,[157] treaty members will recognize the reserving state in one of two ways.[158]

A. Bound with the Benefit of Reservation

Under Article 20(4)(b) of the Vienna Convention, a state that objects to another state's reservation may voice its opposition to the reservation, but still permit the treaty, minus the provisions to which objectionable reservations have been attached, to bind both states.[159] If an objecting state chooses to employ this mild form of sanction,[160] then neither the reserving state nor the objecting state can hold the other responsible for any of the provisions upon which reservations have been placed.[161] This creates a situation in which both the reserving and objecting states have the same reciprocal treaty obligations.[162] Thus, for the reserving state, the practical consequence of employing this type of sanction is the same as if the reservation was simply accepted.[163] In both cases, the reserving state is regarded as a party to the treaty and is not bound by the provisions to which it placed reservations.[164] The only difference is that by

157. Not all parties objected to the United States's reservations. *See* Sherman, *supra* note 78, at 72. To the contrary, only 11 of well over 100 states objected to U.S. reservations. *See id.* If a state accepts another country's reservation, then the treaty, less the reservations, takes effect between the two nations and both parties are bound by reciprocal obligations. *See* Vienna Convention, *supra* note 71, art. 20, para. 4. A state may accept a reservation through either explicit or tacit consent. *See id.* art. 20, paras. 4-5. If a state does not object to a reservation within 12 months of when it was made, then the state is judged to have accepted the reservation. *See id.* art. 20, para. 5.

158. *See* Vienna Convention, *supra* note 71, art. 20, para. 4. An objecting state may oppose another state's reservation either with or without an attached statement that explicitly precludes the treaty from entering into force between the objecting state and the reserving state. *See id.*

159. *Id.* art. 20, para. 4(b).

160. *See id.* (allowing objecting states to prevent a treaty from taking effect between themselves and a reserving state).

161. *See id.* art. 21, paras. 1 (a)-(b).

162. *See id.* art. 21, para. 1(a) (allowing a state to change its obligations through reservations). Article 21, para. (1)(b) notes that any changes modify "those provisions to the same extent for that other party (the one that accepts the reservations) in its relations with the reserving State." *Id.* art. 21, para. (1)(b). Although the obligations between reserving and objecting states may change, a "reservation does not modify the provisions of the treaty for the other parties to the treaty [inter se]." *Id.* art. 21, para. (2).

163. *See* Hylton, *supra* note 81, at 433 (citing debates from the drafters of the Vienna Convention in 20 GERMAN Y.B. INT'L L. 277, 290-91 (1977)). If the reserving state is able to become a treaty party and not comply with the provisions to which it attached reservations, it is questionable whether the objecting state really "objected" in any meaningful way. *Id.* Because the objecting state allows the reservation to be recognized, in practice its "objection" may be better classified as an inconsequential "declaration." *Id.*

164. *See id.* at 433. That reserving states have been allowed this type of flexibility has

objecting under Article 20(4)(b), states have the opportunity to express their disapproval and pressure the reserving state into accepting the full treaty.[165]

B. Prohibiting the Treaty Participation of Reserving States

Instead of creating reciprocal obligations under Article 20, Article 19 allows the objecting state to reject the reservation and not allow the treaty to come into effect at all between itself and the reserving state.[166] In effect, this type of sanction prevents the reserving state and objecting state from making any treaty demands of each other.[167] The objecting state, however, lacks the power to prevent other states from recognizing the reserving state as a legitimate treaty member.[168] Because the Vienna Convention permits each objecting party to apply sanctions according to either Article 19 or Article 20, a single treaty may contain different treaty obligations between different nations.[169]

C. Invalid Reservations as Severable

Although the Human Rights Committee ostensibly relies on the

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been widely criticized. *See, e.g.*, SINCLAIR, *supra* note 90, at 50. Sinclair states that:

> The assumed advantage of a more flexible reservations regime is that it will encourage a larger number of States to become parties to multilateral Conventions; but this advantage will be more than counterbalanced if the effect of the greater liberality is to destroy, or to undermine, the fundamental basis of the treaty itself."

Id.

165. *See* Vienna Convention, *supra* note 71, arts. 19 & 20; MCNAIR, *supra* note 84, at 106.

166. Vienna Convention, *supra* note 71, art. 20, para. 4(b).

167. *See id.*

168. *See generally id.* arts. 19-20. The Vienna Convention recognizes only one circumstance in which the objection of a single state may prevent a reservation from being accepted by other states. *Id.* art. 20, para. 3. Unanimous consent is not required when there is both a "limited number" of negotiating states and a reservation that is contrary to the "object and purpose" of the treaty in question. *Id.* art. 20, para. 2. Putting the "object and purpose" question aside, because well over 100 countries signed the ICCPR—far from a "limited number,"—it is clear that this exception does not apply in the context of the ICCPR. *See supra* note 157.

169. Vienna Convention, *supra* note 71, at 433; *see* Hylton, *supra* note 81, at 433. Hylton illustrates this situation with a three-party hypothetical in which a state makes reservations that one party accepts, but another party rejects. *See id.* If the accepting and rejecting parties share treaty obligations between themselves, all three parties may be subject to the same treaty and, yet, owe each other completely different obligations. *See id.* This system has been criticized for jeopardizing "certainty on a fundamental aspect of the law of treaties: the identity of the parties." GORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 157 (George W. Keeton & Gorg Schwarzenberger eds., 5th ed. 1967).

authority of the Vienna Convention in its determinations of what constitutes an invalid reservation,[170] the Human Rights Committee dismisses the Vienna Convention's two alternatives for handling an invalid reservation.[171] Contrary to the Vienna Convention, the Committee states that an invalid reservation "will generally be severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation."[172]

To explain this derivation from the Vienna Convention, the Human Rights Committee argues that the unique character of human rights treaties is not well suited for a flexible system of accommodating treaty reservations.[173] The Committee argues, therefore, that in human rights treaties "[t]he principle of inter-State reciprocity has no place."[174] Although the Committee does not cite any other authority or precedent that supports binding a state to a provision to which consent has been explicitly withheld,[175] scholar William Schabas has drawn attention to a case that arguably supports the Committee's conclusions.[176]

In *Loizidou v. Turkey*,[177] the European Court of Human Rights ruled on the validity of a Turkish reservation to the European Convention.[178] The Court held that the Vienna Convention's "object and purpose" test rendered Turkey's reservation invalid.[179] In determining the consequences of Turkey's invalid reservation, the Court sought to ascertain

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170. *See supra* notes 112-16 and accompanying text (describing how the Committee adopted and added to the Vienna Convention's "object and purpose" test).

171. *See* General Comment No. 24 (52), *supra* note 86, para. 17. In the Human Rights Committee's opinion, "the operation of the classic rules on reservations is . . . inadequate." *Id.* para. 8.

172. *Id.* para. 18.

173. *See id.* para. 17 (stating that with respect to the consequences of an invalid reservation, the Vienna Convention framework is inadequate because human rights treaties "are not a web on inter-State exchanges of mutual obligations").

174. *Id.*

175. *See generally id.*

176. *See* Schabas, *Invalid Reservations*, *supra* note 8, at 313-14 (explaining that the European Court of Human Rights, through its decision in Loizidou v. Turkey, 131 Eur. Ct. H.R. (ser. A) (1988), has put new life into the consequences of invalid treaty reservations).

177. 131 Eur. Ct. H.R. (ser. A) (1988) (ruling that Turkey was bound by treaty provisions restricting its activity in Northern Cyprus, despite the fact that Turkey had attached treaty reservations to those provisions).

178. *See id.* para. 89. The case involved a Greek Cypriot applicant, Loizidou, who charged that Turkish troops had prohibited her from returning to her home in Northern Cyprus. *See id.* para. 11. Loizidou charged that the Turkish police violated her rights under the European Convention on Human Rights, which Turkey had ratified. *See id.* para. 15. Turkey responded that it had placed reservations on the provisions under which Loizidou based her claim. *See id.* para. 17.

179. *Id.* para. 89.

whether Turkey conditioned its consent to the treaty upon not being bound by the provisions to which it attached reservations.[180]

When Turkey ratified the European Convention, it explicitly consented to the authority of the European Court of Human Rights to hear and settle all disputes concerning its reservations.[181] The Court concluded that this demonstrated Turkey's intent to be bound by all foreseeable decisions of the Court, which included the possibility that the Court would find Turkey's reservations invalid and declare those invalid reservations as severable.[182] The Court concluded that Turkey foresaw these results, and that Turkey's reservations were not so essential that without them the country would have withheld its consent to the treaty.[183]

Although Turkey expressed an unwillingness to be bound without the benefit of its declarations, the European Court disregarded this evidence because it came after Turkey agreed to be bound by the Court's determinations.[184] Thus, *Loizidou* does not support the position that international courts are willing to bind states beyond what those states intended.[185]

Unlike the facts in *Loizidou*, there is no indication that the United States foresaw any treaty body ruling on whether its reservations to the ICCPR were severable or non-severable.[186] Moreover, the United States has explicitly stated, before and after the objections of other states, that its reservations constitute integral parts of its consent to the ICCPR and

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180. *See id.* para. 90 (stating that in order for Loizidou to prevail, it had to be shown that Turkey's reservations were not an essential basis for its consent).

181. *See id.* para. 27. Turkey recognized "as compulsory *ipso facto* and without special agreement [to] the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention . . . ." *Id.* para. 27.

182. *See id.* para. 95 (concluding that Turkey had indicated a "willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention['s] institutions without affecting the validity of the declarations themselves").

183. *See id.*

184. *See id.* ("The Court does not consider that the issue of the severability of the invalid parts of Turkey's declarations can be decided by reference to the statements of her representatives expressed subsequent to the filing of the declarations.").

185. *See* Schabas, *Invalid Reservations*, *supra* note 8, at 322 (admitting that "[t]he European Court did not set aside the test of intention in determining whether a reservation is severable").

186. *See supra* notes 108-11 and accompanying text (describing how the United States and other nations did not consent to the power of the Human Rights Committee). While the United States recognized the authority of the Human Rights Committee to listen to disputes between nations, it also stated that under the language of the ICCPR, "[t]he Committee can exercise this authority only if both Parties—the complaining State and the State which is the object of the complaint—recognize the Committee's competence." Senate Comm. on Foreign Relations, *supra* note 23, at 651.

simply cannot be ignored.[187] Given these stark factual differences, *Loizidou* does not support the Human Rights Committee's attempt to convince U.S. courts that the ICCPR juvenile death penalty provision binds the United States despite the country's reservation.[188]

V. A PROPOSED FRAMEWORK

Although the ICCPR empowers the Human Rights Committee to monitor the compliance of parties to the Convention, the ICCPR does not permit the Human Rights Committee to speak with absolute authority on the issue of treaty reservations.[189] The Committee claims to receive its powers from Article 40, yet Article 40 only allows the Committee to attach comments to the compliance reports of contracting states.[190] The Covenant does not designate these comments as binding, and as such, Article 40 should be read as granting the Committee nothing more than advisory power.[191]

In the absence of a recognized body responsible for determining the validity of reservations, the Vienna Convention places the responsibility on the individual states that are parties to the ICCPR.[192] Although this will admittedly splinter treaty agreements,[193] this approach is consistent with the plain language of the ICCPR and presumably with the intent of those states that have ratified the treaty.[194] In the complete absence of

187. *See Observations by the Governments*, *supra* note 108, at 424.

188. *See supra* notes 177-88 and accompanying text.

189. *See* Schabas, *Invalid Reservations*, *supra* note 8, at 315-16 (ceding that "[s]tates that ratify the Covenant only undertake to submit periodic reports to the Committee, and this implies little more than a dialogue or exchange of information and views between the Committee and state party").

190. ICCPR, *supra* note 16, art. 40, para. 4.

191. *Id.* art. 40; *see* John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1294 (1993) (noting that the "Covenant does not require a state to comply with the view of the Committee"); Schabas, *Invalid Reservations*, *supra* note 8, at 315 (recognizing that "on a strict reading of the Covenant, nothing that the Committee says is really 'binding' upon states parties"); Stewart, *supra* note 79, at 1188 (noting that the Committee has "no enforcement power").

192. *See* Sherman, *supra* note 78, at 84 (stating that the Vienna Convention allows states to consider individually whether another state's reservation is valid or invalid).

193. *See generally* Genocide Convention Case, *supra* note 84, at 45-46 (Guerrero, McNair, Read, and Hsu Mo, JJ., dissenting) (expressing their fear that while a flexible approach may increase treaty participation, it may also reduce the treaty's significance because states will be able to avert the treaty's most reformative provisions).

194. *See Observations by the Governments*, *supra* note 108, para. 1 (stating that it would be "a rather significant departure from the Covenant scheme" to infer that the Human Rights Committee has the competence to rule on whether a reservation violates the ICCPR's object and purpose).

ICCPR provisions that would clarify the issue,[195] each state should be free to determine its own criteria for accepting or rejecting a state's reservation as contrary to the ICCPR's "object and purpose."[196]

Should an objecting state not recognize another state's reservation, the state placing the reservation should not be regarded as bound by provisions to which it has not consented.[197] Objecting states should be limited to either rejecting the reserving state altogether or accepting the reserving state as a treaty party that deserves criticism, but is nonetheless exempt from specified provisions.[198] To allow objecting states powers beyond this is to reject the basic principles of self-determination that underlie the ICCPR and the principles of consent that govern international treaty law.[199]

VI. CONCLUSION

The use of customary international law or standards as an interpretive tool for the Eighth Amendment will not be accepted by positivist jurisprudence of the current Supreme Court. Though the ICCPR ostensibly provides new opportunities for positivist arguments against the death penalty, reservations protect the United States from being forced to alter the status of its juvenile death penalty practices. Even if the Vienna Convention's "object and purpose" test for reservations is adopted, the ICCPR posits individual states as the appropriate authorities for applying this test. As a persistent objector to international efforts to ban the death penalty, no state or U.S. court should rule that the United States is in violation of the ICCPR's "object and purpose." If, in the extreme case, states disregard the United States's persistent objector status, those states are empowered to reject the United States as a party to the

195. *See supra* note 98.

196. Sherman, *supra* note 78, at 84 ("[The Vienna Convention] provides no definitive method for determining when a reservation is incompatible with the object and purpose of the treaty. Rather, it allows states to judge incompatibility individually.").

197. *See* Genocide Convention Case, *supra* note 84, at 20 ("It is well established that in its treaty relations a State cannot be bound [against any state] without its consent."); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporters's note 2 (1986) (declaring that "international law essentially depends on the consent of states"); *Observations by the Governments*, *supra* note 108, para. 5 (noting that the fundamental principle of treaties is that "obligation is based on consent").

198. *See generally* Vienna Convention, *supra* note 71, arts. 19-20.

199. *See Observations by the Governments*, *supra* note 108, para. 5 ("A state which does not consent to a treaty is not bound by that treaty."); Ginger, *supra* note 65, at 1383 (noting that the Human Rights Committee has emphasized the value of self-determination); Sherman, *supra* note 78, at 963 ("Treaty law consists of expressly accepted obligations spelled out in international agreements freely adhered to by states.").

ICCPR. Objecting states, however, are not empowered, through the authority of the Human Rights Committee, to bind the United States to provisions from which it has explicitly withheld its consent. Thus, despite the temptation, U.S. courts should not overturn the death sentences given to juvenile offenders by relying on the United States's purported commitments under the ICCPR.